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No. 09-

IN THE
Supreme Court of the United States

In re: STONE & WEBSTER, INC.

SAUDI AMERICAN BANK,

Petitioner,

v.

SAUDI ARABIAN OIL CO.,
STONE & WEBSTER, INC.,
STONE & WEBSTER ENGINEERING CORP.,
and SWE&C LIQUIDATING TRUSTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit affirmed the District Court's rejection of the appeal by petitioner, Saudi American Bank ("SAMBA"), of the Bankruptcy Court's denial of SAMBA's motion to intervene as of right in an adversary proceeding. SAMBA made its motion under Federal Rule of Procedure 24(a)(1) on the ground that Section 1109(b) of the Bankruptcy Code, 11 U.S.C. § 1109(b), gives it an unconditional right to intervene because it is a creditor in the related bankruptcy case and is, therefore, a party in interest in the proceeding. SAMBA also moved under Rule 24(a)(2) because of its protectable legal interest, pursuant to an assignment of contract proceeds, in the property that is the subject of the adversary proceeding (in which a third party seeks to recover the proceeds for itself).

Three questions are presented:

1. Whether creditors in a Chapter 11 bankruptcy case, expressly defined to be parties in interest for purposes of § 1109(b), have an absolute right to intervene in adversary proceedings commenced under the case.

2. Whether the Third Circuit erred by failing to rule that, independent of SAMBA's status as a creditor, SAMBA's interest in the contract proceeds at issue in the adversary proceeding makes it a party in interest.

3. Whether the Third Circuit erred by failing to rule that SAMBA's interest in the contract proceeds constitutes a sufficient interest to warrant intervention as of right under Rule 24(a)(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner Saudi American Bank states that it has no parent corporation and there is no publicly held company that holds 10% or more of its stock.

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OPINIONS AND ORDERS BELOW

None of the opinions and orders below is reported. The nonprecedential opinion of the United States Court of Appeals for the Third Circuit was filed on July 2, 2009. That opinion was an amendment of an earlier nonprecedential opinion filed on June 1, 2009. The Third Circuit affirmed the August 29, 2007, decision of the United States District Court for the District of Delaware, which had affirmed the denial by the United States Bankruptcy Court for the District of Delaware of SAMBA's motion to intervene in an adversary proceeding pending in the Bankruptcy Court.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit rendered its initial opinion on June 1, 2009, and entered judgment that same day. SAMBA filed a timely Petition for Rehearing *En Banc*. The Third Circuit rendered its amended opinion on July 2, 2009 (Appendix A), and denied SAMBA's request for rehearing on that same day (Appendix D). The amended opinion has no effect on the June 1 judgment of the Court of Appeals (Appendix B).

RELEVANT PROVISIONS INVOLVED

Title 11 United States Code, Section 1109. Right to be heard.

. . .

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

Federal Rule of Civil Procedure 24(a) — Intervention.

(a) Intervention of Right.

On timely motion, the court must permit anyone to intervene who:

> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

STATEMENT OF THE CASE

SAMBA moved to intervene in an adversary proceeding brought by Chapter 11 debtors Stone & Webster, Incorporated ("SWINC") and its direct and indirect subsidiaries, including Stone & Webster Engineering Corporation ("SWEC") (collectively, the "Debtors"), against Saudi Arabian Oil Company ("Saudi Aramco"). Between commencement of the adversary proceeding and the Bankruptcy Court's denial of the motion to intervene, SWINC was dismissed from the proceeding and the SWE&C Liquidating Trustee succeeded to SWEC's interest in the proceeding. The Bankruptcy Court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. §§ 157(b), 1330 & 1334.

SAMBA's Loan To BS&W And Its Two Forms of Security

Bugshan Stone & Webster ("BS&W") is a joint venture formed under the laws of Saudi Arabia and owned on a 50/50 basis by SWEC and Abdullah Said Bugshan & Brothers ("ASB&B"), a Saudi Arabian business enterprise. In June 1994, BS&W entered a construction contract with Saudi Aramco (the "Ras Tanura Contract") to provide Saudi Aramco with design, engineering and construction services for a pipeline project at its refinery in Ras Tanura, Saudi Arabia.

SAMBA, a Saudi Arabian bank, provided financing to BS&W in connection with the Ras Tanura project (the "BS&W Loan"). Specifically, SAMBA granted BS&W a $35 million credit facility in 1995, which it renewed in

1998. SAMBA obtained two sources of security for the BS&W Loan beyond BS&W's promise to pay: (1) an assignment of the proceeds of the Ras Tanura Contract that would be paid by Saudi Aramco (the "Assignment of Contract Proceeds" or the "Assignment"); and, independently, (2) payment guaranties, one by ASB&B and one by SWEC.

The Assignment of Contract Proceeds, dated January 22, 1995, was executed by BS&W and delivered to SAMBA. BS&W assigned to SAMBA all the proceeds of the Ras Tanura Contract (the "Contract Proceeds"), expressly including proceeds of all claims arising out of the Ras Tanura Contract, as security for all obligations of BS&W to SAMBA. Under the Assignment, SAMBA is allowed to apply the Contract Proceeds against obligations of BS&W, whether incurred in connection with the Ras Tanura Contract or otherwise.

In the Assignment, BS&W agreed to notify all payors under the Ras Tanura Contract, including Saudi Aramco, that: (a) it had assigned the Contract Proceeds to SAMBA; (b) all Contract Proceeds due to BS&W should therefore be paid directly to SAMBA; and (c) BS&W's authorization to payors to make the payments to SAMBA would remain in effect unless and until it was revoked in writing by SAMBA.

The Assignment also empowered SAMBA to deposit all Contract Proceeds into a collateral account for BS&W established pursuant to the Assignment. Further, BS&W appointed SAMBA as its attorney to file claims, institute proceedings and take such other actions concerning Contract Proceeds as SAMBA might consider necessary or desirable to protect its rights under the Assignment.

Before the BS&W Loan closed, by letter dated September 21, 1994, BS&W implemented the Assignment by requesting and authorizing Saudi Aramco to pay SAMBA for credit to BS&W's account "any and all compensation due" from Saudi Aramco under the Ras Tanura Contract (the "Specific Payment Instruction Letter"). By its terms, the Specific Payment Instruction Letter is not revocable by BS&W and remains effective until final settlement of the Ras Tanura Contract.

In an Acknowledgment of Assignment dated November 13, 1994, Saudi Aramco "acknowledge[d] receipt of [the] payment assignment letter," referring to and attaching the Specific Payment Instruction Letter. Saudi Aramco copied SAMBA on the acknowledgment.

Ultimately, BS&W defaulted on its obligations to SAMBA. ASB&B paid one-half of the debt owed by BS&W, meeting in full its obligation under its guaranty. However, the remaining portion of the outstanding loan to BS&W has not been paid.

On the date of Debtors' bankruptcy petition, June 2, 2000, the amount outstanding on the portion of the loan for which SWEC had agreed to be responsible was $6,728,549. As a result, SAMBA attempted to recover BS&W's outstanding obligations from the two remaining sources that SAMBA obtained as security, namely SWEC's guaranty and the Assignment of Contract Proceeds.

In a letter dated May 11, 2002 (prior to Debtors having commenced the adversary proceeding), SAMBA reminded Saudi Aramco that the Assignment of Contract Proceeds remains in full force and effect and that the Specific Payment Instruction Letter, including the assignment and authorization referred to therein, are not revocable and continue in effect. SAMBA notified Saudi Aramco that BS&W remained in debt to SAMBA for an amount in excess of $7,000,000 and requested and directed Saudi Aramco to continue to pay any proceeds (whether progress payments, retention payments, or payments in settlement of claims or otherwise) directly to SAMBA.

A few weeks later, Saudi Aramco confirmed to SAMBA in writing that both the Assignment of Contract Proceeds and the authorization contained in the Specific Payment Instruction Letter are irrevocable and continue to be in full force and effect.

Debtors Commence The Adversary Proceeding, Seeking Recovery Under The Ras Tanura Contract

The Debtors brought the adversary proceeding in response to a bankruptcy proof of claim filed by ASB&B, SWEC's co-owner of BS&W. ASB&B asserted that, in a lawsuit pending in Saudi Arabia, it might be held liable for BS&W's debt to a subcontractor on the Ras Tanura project because it is an owner of BS&W. ASB&B claimed a contingent right to contribution from SWEC in the event it is held liable to the subcontractor.

The Debtors' complaint sets forth four causes of action against Saudi Aramco, including counts for declaratory relief, indemnification, breach of contract and turnover. The first count seeks a declaration that SWEC is not liable to Saudi Aramco under a guaranty of certain obligations of BS&W;[1] the second count seeks indemnification from Saudi Aramco for any liabilities SWEC is determined to have to the subcontractor. In the last two counts, Debtors seek to recover $148 million of payments and proceeds under the Ras Tanura Contract, to which the Debtors are not parties. The breach of contract and turnover counts are predicated on the theory that, if SWEC is determined to be liable for BS&W's debts by virtue of its ownership position, then SWEC should be entitled to assert BS&W's rights, including its contract rights against Saudi Aramco. Accordingly, the Debtors' complaint seeks damages for Saudi Aramco's alleged breaches of the Ras Tanura Contract and the turnover to the bankruptcy estate of $148 million, which are described as "Withheld Funds" that are "due and owing" under the Ras Tanura Contract.

At a hearing before the Bankruptcy Court on October 3, 2002, the Debtors, Saudi Aramco and ASB&B represented to the court that they had reached a settlement in principle of the adversary proceeding and ASB&B's proof of claim. The settlement was described as conditional on documenting the agreement, the resolution of the Saudi lawsuit between BS&W and the subcontractor, and the resolution of a Saudi arbitration

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[1] This is a different guaranty from the SWEC guaranty in favor of SAMBA that is described above.

between BS&W and Saudi Aramco. Debtors' counsel stated on the record that there would be interrelated settlements between and among the Debtors, Saudi Aramco and ASB&B which would resolve the contract claims in the adversary proceeding as well as ASB&B's proof of claim and the Debtors' objection thereto. Debtors' counsel further represented, and counsel for Saudi Aramco confirmed, that the proposed settlement would include a payment by Saudi Aramco of at least $15 million towards resolution of the claims.

SAMBA's Complaint In Intervention

SAMBA filed its Motion to Intervene a month later.[2] SAMBA's Complaint in Intervention is an action for declaratory and injunctive relief through which it seeks to protect its contract rights and first security interest in the proceeds of the Ras Tanura Contract under the Assignment of Contract Proceeds. As noted, the assigned proceeds expressly include "proceeds of claims arising out of the Contract." SAMBA seeks to protect its interest by ensuring that any proceeds arising from a judgment in the adversary proceeding or from a settlement between or among Saudi Aramco, the Debtors and ASB&B are paid in accordance with the Assignment of Contract Proceeds and its implementing documents — that is, directly to SAMBA for credit against BS&W's liability for the unpaid loans.

At the time SAMBA's motion to intervene was filed (and today), Saudi Aramco had moved to dismiss the

[2] In the Motion, SAMBA also sought to join ASB&B as a defendant. SAMBA did not pursue that relief on appeal.

Debtors' complaint, but the Debtors had not responded to the motion to dismiss and no notice of completion of briefing had been filed. The Court has not heard argument on or decided the motion to dismiss. Saudi Aramco had not (and has not) answered the Debtors' complaint. No scheduling order has been set and no deadlines have passed.

In addition to the express claims to Contract Proceeds set forth in the Debtors' complaint, representations by the SWE&C Liquidating Trustee confirm that the proceeds in which SAMBA has a security interest are at stake in the adversary proceeding. For example, at a status conference held in June 2005, counsel for the SWE&C Liquidating Trustee confirmed on the record that the adversary proceeding was at least in part about proceeds of the Ras Tanura Contract. Counsel stated, "SAMBA believes it has an interest in the contract proceeds, your Honor. We do not believe that our litigation is ultimately about contract proceeds *entirely. A portion of it is in contract proceeds.*" (Emphasis added). Similarly, in its brief on appeal to the District Court, the SWE&C Liquidating Trustee again confirmed that the Ras Tanura Contract at least partially underlies the adversary proceeding.

The Contract Proceeds Are SAMBA's Only Remaining Collateral For The BS&W Loan

SAMBA's pursuit of payment under the SWEC guaranty has not yet yielded any payment of the debt outstanding at the time of the bankruptcy filing or of the interest that has accrued in the succeeding nine years. SAMBA holds an allowed, unsecured claim of

$2.5 million in the Stone & Webster bankruptcy case but has received no payments on account of it. In litigation separate from this proceeding, the Third Circuit recently rejected SAMBA's contention that the company that purchased most of the assets and assumed many of the liabilities of SWEC had assumed the SWEC debt to SAMBA under the guaranty. As a result, SAMBA's interest in the proceeds of the Ras Tanura Contract is its only remaining security for the balance of the BS&W Loan, which now stands at over $10 million.

REASONS FOR GRANTING THE PETITION

Whether creditors and other parties in interest have an unconditional right under Bankruptcy Code § 1109(b) to intervene in adversary proceedings brought under Chapter 11 cases is an important question of federal law on which the circuit courts are split. The Third Circuit's determination that SAMBA, as a creditor in the Stone & Webster bankruptcy case, does not have such a right is contrary to the plain language of the statute, to a decision of the Second Circuit and, inexplicably, to the Third Circuit's own precedents.

Review by this Court is also essential to correct the Third Circuit's apparent misunderstanding of the nature of SAMBA's interest in the Contract Proceeds and to reverse its erroneous conclusions that SAMBA's interest (a) does not make SAMBA a "party in interest" in the adversary proceeding independent of its status as a creditor and (b) does not suffice to require the Bankruptcy Court to allow SAMBA to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure, applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7024.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT REGARDING THE APPLICATION OF § 1109(b) IN ADVERSARY PROCEEDINGS.

A. *The Plain Language Of § 1109(b) Provides SAMBA, As A Creditor And Party In Interest, An Unqualified Right To Intervene.*

The principal question presented by this petition is an issue of interpretation of § 1109(b). As always, one must "begin[] where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *Id.* at 240-41.

Section 1109(b) provides that "[a] party in interest, *including* the debtor, the trustee, a creditors' committee, an equity security holders' committee, *a creditor*, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." (Emphasis added.) SAMBA, a creditor in the Stone & Webster Chapter 11 case, is therefore by definition a party in interest for purposes of intervention pursuant to § 1109(b). The statute imposes no conditions or qualifications on a party in interest's right to appear and be heard, and thus the only issue for interpretation is whether an adversary proceeding brought under a Chapter 11 case concerns "issue[s] in [the] case." The question must be answered in the affirmative.

In the Bankruptcy Code, the term of art "case" refers to the bundle of litigation "commenced by the filing with the bankruptcy court of a petition under" a chapter of the Code by an entity eligible to be a debtor. *See, e.g.*, 11 U.S.C. § 301(a). Courts and commentators agree that the "case" triggered by the filing of the petition is an "umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant." *Sonnax Indus. v. Tri Component Prods. Corp.* (*In re Sonnax Indus.*), 907 F.2d 1280, 1283 (2d Cir. 1990). As the advisory committee note to former bankruptcy rule 101 states, "case" "embraces all the controversies determinable by the court of bankruptcy and all the matters of administration arising during the pendency of the case." In the words of a leading treatise, the "case" is "the whole ball of wax." 7 *Collier on Bankruptcy* ¶ 1109[1][a][i] (15th ed. Rev. 2008) (hereinafter, "*Collier*").

An adversary proceeding, on the other hand, is one of the controversies subsumed in the case. It is one form of judicial proceeding through which the bankruptcy court decides "issues" — i.e., points in dispute between two or more parties, *Black's Law Dictionary* 835 (7th ed. 1999). The Bankruptcy Code and rules contemplate numerous discrete proceedings commenced by a complaint, motion, or other pleading or application for judicial action, including plan confirmation, 11 U.S.C. § 1129, approval of the assumption of executory contracts and unexpired leases, *id.* § 365, avoidance and recovery of preferential payments and other transfers, *id.* §§ 547, 550, and approval of settlement agreements between the estate and others, Fed. R. Bankr. P. 4001(d).

While the term "adversary proceedings" does not appear in the Bankruptcy Code, an entire Part of the Federal Rules of Bankruptcy Procedure is dedicated to their governance. An adversary proceeding is commenced by the filing of a complaint, Fed. R. Bankr. P. 7003, and constitutes a "'full blown federal lawsuit[] within the larger bankruptcy case,'" *Section 1120(A)(1) Comm. of Unsecured Creditors v. Interfirst Bank Dallas, N.A.* (*In re Wood & Locker, Inc.*), 868 F.2d 139, 142 (5th Cir. 1989) (quoting E. Warren & J.L. Westbrook, *The Law of Debtors and Creditors* 175 (1986)).

> It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

Fed. R. Bankr. P. 7001. Adversary proceedings raise "issue[s] in a case" and § 1109(b), by its plain and unconditional terms, gives creditors in the case the right to intervene.

B. *The Courts Of Appeals Are Divided As To Whether § 1109(b) Applies To Adversary Proceedings.*

The Second Circuit and, in prior cases, the Third Circuit have given effect to the plain meaning of § 1109(b) and held that the section applies to adversary proceedings under or related to Chapter 11 cases. *See Term Loan Holder Comm. v. Ozer Group, L.L.C.* (*In re Caldor Corp.*), 303 F.3d 161, 169 (2d Cir. 2002); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240-41 (3d Cir. 1994); *Official Unsecured Creditors' Comm. v. Michaels* (*In re Marin Motor Oil, Inc.*), 689 F.2d 445, 449-53 (3d. Cir. 1982).

The Fifth Circuit has decided the question the other way, *see Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1287 (5th Cir. 1985), and other Courts of Appeals, while not deciding the question, have indicated in dicta that they agree with the Fifth Circuit's conclusion, *see Richman v. First Woman's Bank* (*In re Richman*), 104 F.3d 654, 658 (4th Cir. 1997) (adopting *Fuel Oil*'s rationale and requiring satisfaction of Rule 24(a)(2) in a Chapter 7 context); *Vermejo Park Corp. v. Kaiser Coal Corp.* (*In re Kaiser Steel Corp.*), 998 F.2d 783, 790 (10th Cir. 1993); *Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136, 1142 n.8 (1st Cir. 1992) (citing *Fuel Oil* for the proposition that § 1109(b) does not afford an absolute right to intervene under Rule 24(a)(1)).

Fuel Oil held that § 1109(b) did not apply to adversary proceedings notwithstanding its recognition of the force of the plain language of the statute:

> At first blush, prior bankruptcy practice and the legislative history of § 1109(b) appear to support the view of the Third Circuit that § 1109(b) requires a bankruptcy court automatically to allow a party in interest to intervene in adversary proceedings. Section 1109(b) is derived from Chapter X, Rule 10-210(a) of the former bankruptcy code. This rule, in turn, was based on § 206 of the former code. As a leading bankruptcy treatise notes, the scope of the rights created by § 206 and Rule 10-210(a) was broadly construed.
>
> > The standing conferred by Section 206 of the Bankruptcy Act and Chapter X Rule 10-210(a)(1) was absolute and unlimited, and gave the debtor, creditors, stockholders and indenture trustees the same rights as if they were successful intervenors in the case, but without the necessity of a formal order of intervention. Those within the specified categories who sought to participate in the reorganization, therefore, were by statute parties to the case.

> 5 *Collier on Bankruptcy* ¶ 1109.02 at 1109-19 to -20 (15th ed. 1984).
>
> As the legislative history of § 1109(b) makes clear, Congress intended § 1109(b) to carry forward to the current Bankruptcy Code the broad rights to appear and be heard granted to interested parties under the former bankruptcy code. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 116, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5902 (noting that § 1109(b) provides a creditor "in unqualified terms . . . [with] the right to be heard as a party in interest. . . ."). *See also* 5 *Collier on Bankruptcy* ¶ 1109.02 at 1109-23 (§ 1109(b)'s designated "parties in interest" presumably do not have to intervene formally in a Chapter 11 case). Furthermore, as the *Marin* court pointed out, the Bankruptcy Code makes no distinction between "case" and "adversary proceeding" for intervention purposes. Based on the Bankruptcy Code alone, therefore, the argument that § 1109(b) creates an absolute right to intervene in adversary proceedings appears strong.

Fuel Oil, 762 F.2d at 1285-86 (footnote omitted). The Fifth Circuit nevertheless put aside the plain language of the statute, the legislative history, and prior bankruptcy practice and was swayed instead by implications derived from the procedural rules governing intervention in bankruptcy matters and policy considerations.

Looking to Rule 24(a)(1), *Fuel Oil* noted that courts are hesitant to find unconditional statutory rights of intervention and that § 1109(b), which applies to a wide array of private parties, is not like some of the other statutes that have been found to grant absolute rights to intervene. "The statutes that do confer an absolute right to intervene," according to *Fuel Oil*, "generally confer that right upon the United States or a federal regulatory commission." *Id.* at 1286.

Fuel Oil also highlighted § 1109(b)'s reference to issues in a "case" and noted that the Bankruptcy Code and rules distinguished between "bankruptcy 'cases' and the proceedings related to them" and that there were different procedural rules for intervening in adversary proceedings and in bankruptcy cases. *Id.* (citing Fed. R. Bankr. P. 2018 & 7024).

As for policy considerations, *Fuel Oil* determined that Congress must have intended for Rule 24(a)(2) rather than Rule 24(a)(1) to apply to applications to intervene in adversary proceedings because otherwise the bankruptcy judge would have little control over who would become party to the litigation before it. By requiring all applicants to meet the criteria of Rule 24(a)(2), "the bankruptcy court is permitted to control the proceeding by restricting intervention to those persons whose interests in the outcome of the proceeding are not already adequately represented by existing parties." *Id.* at 1287.

The Second Circuit, the Court of Appeals that has most recently decided the question, thoroughly evaluated the factors that drew *Fuel Oil* away from the

plain meaning of § 1109(b) and found them wanting. *Caldor Corp.*, 303 F.3d at 170-76. As an initial matter, it noted that arguments relying on rules of bankruptcy procedure to curtail the text of statutory provisions run afoul of the Rules Enabling Act, 28 U.S.C. § 2075, which provides that the rules prescribed thereunder "shall not abridge, enlarge, or modify any substantive right." *Id.* at 170-71. *Caldor Corp.* went on to find that, in any event, the aspects of the bankruptcy rules and advisory committee notes that purportedly created ambiguity in the text were not inconsistent with the application of § 1109(b) to adversary proceedings.[3]

As to policy concerns with the prospect of an unconditional right in creditors to intervene in adversary proceedings, the Second Circuit noted reasonable arguments on both sides of the question. *Id.* at 175. On the one hand, it recognized that *Fuel Oil* and other opinions have stated concerns about the possibility of swarms of creditors becoming automatic parties to an adversary proceeding, with ensuing inefficiencies and even chaos in the courtroom. *See, e.g.*, *Fuel Oil*, 762 F.2d at 1287; *995 Fifth Ave. Assocs., L.P. v. New York State Department of Taxation and Finance (In re 995 Fifth Ave. Assocs., L.P.)*, 157 B.R. 942, 951 (S.D.N.Y. 1993). On the other hand, the Second Circuit observed that the experience in the Third Circuit, in

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[3] In addition, *Fuel Oil*'s citation of mandatory intervention statutes that confer rights on the federal government ignores numerous such statutes that apply to private parties. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (allowing discrimination complainants to intervene in EEOC enforcement proceedings); 42 U.S.C. § 3614(e) (allowing aggrieved parties to intervene in Fair Housing Act actions).

the decade-plus between its opinions addressing the issue, appears to have been to the contrary. That court was skeptical of doomsday scenarios when it first held in 1982 that § 1109(b) applies to adversary proceedings and allows all creditors an absolute right to intervene:

> Appellants claim that the confusion, disorder, and expense that supposedly would be entailed by allowing each creditor or stockholder to intervene in adversary proceedings are such that it is "clearly unthinkable" that Congress could have intended to allow such a result. But the unqualified right of creditors and stockholders to intervene appears to have been the rule under [the prior bankruptcy law] for approximately 40 years, and the legislative history of section 1109(b) shows no dissatisfaction with it.
>
> Appellants are unable to provide any support for their speculation that multitudes of individual creditors and stockholders would intervene in adversary proceedings unless we reject the broad and absolute reading of section 1109(b). Surely relatively few individuals would have enough interest in the outcome of an adversary proceeding to seek to intervene. . . .

Marin, 689 F.2d at 453.

Twelve years after *Marin*, the Third Circuit reviewed § 1109(b) jurisprudence in the course of affirming its *Marin* holding and made no mention of administrative difficulties stemming from any floods of intervenors. Rather, it highlighted the salutatory effects of an unfettered right to intervene:

> Intervention under [§ 1109(b)] appears to be appropriate to the extent it will: (1) minimize the need for extensive judicial oversight, (2) speed the debtor's successful reorganization, and (3) allow the creditors' committee to exert enough leverage on the debtor-in-possession so that the debtor-in-possession does not use its extensive flexibility and discretion in a Chapter 11 reorganization to compromise the creditors' interests. In short, interests of efficiency and fair play underlie § 1109(b), and the driving force behind the *Marin* decision was the belief that allowing intervention into adversary proceedings would best serve those interests.

Phar-Mor, Inc., 22 F.3d at 1240.

Collier also finds efficiency concerns about massive adjudication to be "more imaginary than real." 7 *Collier* ¶ 1109.04[3][b]. While recognizing that a broad right to participate carries "the risk of some measure of delay and possible abuse," the treatise notes that even in those proceedings in which no one disputes the application of § 1109(b), such as plan confirmation hearings, "most creditors and shareholders are not willing to incur the time, trouble and expense of any significant form of participation." *Id.* ¶ 1109.04[3][a].

C. *The Third Circuit's Decision In This Case Conflicts With The Plain Language Of § 1109(b) And The Interpretation Of The Statute By The Second Circuit And The Third Circuit's Prior Rulings.*

In the opinion below, the minimal analysis set forth by the Third Circuit indicates that it failed to adhere to the plain language of § 1109(b). By rejecting SAMBA's right to intervene under that provision despite its status as a creditor, the Third Circuit reached a result in direct conflict with holdings of the Second Circuit and prior Third Circuit cases. (App. A at 3a-4a.)

While the Third Circuit did not find § 1109(b) inapplicable in adversary proceedings, it imposed conditions on SAMBA's intervention rights as a creditor that do not exist in the statute. Rather than recognize that all creditors are, by the provision's own definition, parties in interest under § 1109(b), the Third Circuit below applied a test to assess the quality of SAMBA's interest. (App. A at 3a-4a.) The test cited (which SAMBA passes in any event, see Part II.A below) is used by the courts not to sort out which creditors have rights under § 1109(b) but rather to determine whether persons not expressly named in § 1109(b)'s nonexclusive list of parties in interest should enjoy the benefit of the statute. SAMBA is unaware of any case other than this one in which a court acknowledged that § 1109(b) applied but rejected a creditor's petition to intervene under it on the basis of the nature of the creditor's interest. The discussions in *Collier* and in all of the cases discussed above on either side of the circuit split — *Caldor Corp.*, *Phar-Mor, Inc.*, *Fuel Oil*, and *Marin* —

assume that all creditors have absolute and unconditional rights under § 1109(b). The legislative history is similarly unambiguous on the point, stating that § 1109(b) "[p]rovides, *in unqualified terms*, that *any creditor*, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by a committee." S. Rep. No. 95-989, at 116 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902 (emphasis added).

The Third Circuit's ruling has the effect of siding with the Fifth Circuit in *Fuel Oil*, rejecting the holdings of *Caldor Corp* and *Phar-Mor, Inc.* that § 1109(b) confers on named parties in interest an absolute right to intervene under Rule 24(a)(1), and requiring SAMBA to satisfy the interest requirement of Rule 24(a)(2).

This Court should allow the writ to resolve the conflict among the Courts of Appeals on this important question affecting the ability of parties in interest to protect their substantive property rights.

II. SAMBA'S INTEREST IN THE PROCEEDS OF THE RAS TANURA CONTRACT IS SUFFICIENT FOR INTERVENTION AS OF RIGHT BOTH UNDER THE § 1109(b) TEST ERRONEOUSLY APPLIED BELOW AND UNDER RULE 24(a)(1).

SAMBA's significant and legally protectable interest conveyed by the Assignment of Contract Proceeds would entitle it to intervene in the adversary proceeding, in which the proceeds themselves are at stake, even if SAMBA were required to meet the test imposed by the

Third Circuit under § 1109(b) or the standard of Rule 24(a)(2). In determining that SAMBA's interest was inadequate, the Third Circuit fundamentally misconstrued it as a "mere economic interest in the outcome of litigation." (App. A at 4a.) SAMBA's secured interest is much more than that — the Debtors' complaint seeks to recover for the estate the very collateral as to which SAMBA obtained rights as security for the BS&W Loan.

A. *SAMBA Passes The General § 1109(b) Party-In-Interest Test*

Even if SAMBA was not automatically a party in interest under § 1109(b) by virtue of its status as a creditor in the Stone & Webster case, it passes the test, cited by the Third Circuit, that is applied to persons and entities not expressly listed in the statute. It is well settled that the word "including" in § 1109(b) is not a limiting term, and therefore parties in interest are not confined to the examples given therein. *See* 11 U.S.C. §102(3) (stating that "'includes' and 'including' are not limiting"); *Nintendo Co. v. Patten* (*In re Alpex Computer Corp.*), 71 F.3d 353, 356 n.3 (10th Cir. 1995); *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985). The phrase "party in interest" "is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings." *Yadkin Valley Bank & Trust Co. v. McGee* (*In re Hutchinson*), 5 F.3d 750, 756 (4th Cir. 1993) (quotation omitted). As noted in the opinion below (App. A at 3a-4a), the Third Circuit has described a party in interest as one who "has a sufficient stake in the proceeding so as to require representation," a determination to be made on a case-by-case basis. *Amatex Corp.*, 755 F.2d at 1042.

SAMBA's stake in the adversary proceeding is more than sufficient. SAMBA is owed over $10 million on the BS&W Loan, and the Contract Proceeds that BS&W pledged to SAMBA are its only remaining form of security. The Debtors' complaint expressly makes claims to amounts "due and owing" under the Ras Tanura Contract; the SWE&C Liquidating Trustee has confirmed on the record that at least a portion of this litigation is about Contract Proceeds; and the settlement described to the Bankruptcy Court but not yet implemented involves a payment of $15 million by Saudi Aramco. SAMBA has a property interest in the very funds at issue in the adversary proceeding and would be entitled to intervene under § 1109(b) even if it were not a creditor. *Cf. In re Koch*, 229 B.R. 78, 82 (Bankr. E.D.N.Y. 1999) (ruling that the National Basketball Association is a party in interest where it claims ownership of property that the debtor claimed to belong to the bankruptcy estate).

B. *SAMBA's Interest Also Suffices Under Rule 24(a)(2).*

SAMBA meets the four elements required for intervention as of right under Rule 24(a)(2):

> [F]irst, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor's interest by existing parties to the litigation.

Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998). SAMBA's briefs below established each of these elements. The Third Circuit took issue with the sufficiency of SAMBA's interest only.

SAMBA's security interest in the Contract Proceeds is the type of "significantly protectable" interest in the subject of an action required for intervention under Rule 24(a)(2). *Kleissler*, 157 F.3d at 969. SAMBA seeks intervention to protect its bargained-for, acknowledged contract right to receive the proceeds of the Ras Tanura Contract.

> Interests in property are the most elementary type of right that Rule 24(a) is designed to protect. Thus, many of the cases in which a sufficient interest has been found . . . have been cases in which there is a readily identifiable interest in land[] or some other form of property. . . . A sufficient interest has also been found when the intervenor claims an identifiable interest in funds that are the subject of the litigation.

7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1908.1 at 309-317 (3d ed. 2000) (footnotes and internal quotation omitted).

The Contract Proceeds constitute a fund at issue in the adversary proceeding, and "an intervenor's interest in a specific fund is sufficient to entitle intervention in a case affecting that fund." *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366

(3d Cir. 1995). In a case quite similar to this one, the Eighth Circuit reversed the denial of intervention, holding that a construction lender with a security interest in payments due from a land owner to the borrower/construction contractor "easily" satisfied the interest requirement of Rule 24(a)(2). The lender was entitled to intervene in the contractor's breach of contract suit against the owner. *See Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). In this case, SWEC and the SWE&C Liquidating Trustee take the role of the contractor, as they assert the rights of BS&W.

Other Rule 24 cases recognize that an intervenor's interest in the funds that the plaintiff seeks to recover is sufficient. For example, *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 53-54 (5th Cir. 1970), reversed the denial of intervention to a law firm that had signed a contingent fee arrangement with a personal injury plaintiff and was later discharged after having initiated the case. The firm was entitled to intervene as of right in the tort action to protect its interest in securing the fee. Similarly, the "finder" who matched a business broker with a seller in *Hardy-Latham v. Wellons* was entitled to intervene under Rule 24(a)(2) in the broker's suit against the seller to recover a commission because the finder claimed a right to a portion of any recovery. 415 F.2d 674, 675-76 (4th Cir. 1968). *See also Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1123-25 (5th Cir. 1970) (affirming intervention as of right by the government where the funds sought by the plaintiff were subject to a tax lien). The Third Circuit's denial of SAMBA's right to intervene under Rule 24(a)(2) is inconsistent with these cases in other circuits. This Court should review this case to ensure harmony in the application of Rule 24.

C. *The Third Circuit Misapprehended The Nature Of SAMBA's Interest In The Contract Proceeds.*

Allowing SAMBA to intervene in this case in no way would require the Court to relax or make an exception to the black letter proposition that "a mere economic interest in the outcome of litigation is insufficient to support a motion to intervene," *see, e.g.*, *Mountain Top*, 72 F.3d at 366, as was suggested in the opinion below (App. A at 3a-4a). The cases to which that statement of law applies are those where a creditor's interest in its debtor's litigation is limited to hoping that the debtor has more money when the case is over.[4] Whether the debtor might obtain a judgment as a plaintiff or fend one off as a defendant, the creditor wants its debtor to be better positioned to pay the debt to creditor. If that type of economic interest sufficed for intervention as of right, then, as the Third Circuit notes, every secured creditor (and unsecured creditor, for that matter) would be permitted to intervene in its debtor's litigation. (App. A at 4a.) But that is not this case.

Here, SAMBA is not interested in general asset enhancement for any of the parties to the adversary proceeding. Rather, SAMBA seeks to protect its property rights in the Contract Proceeds that BS&W pledged to it as collateral for the unpaid BS&W Loan. It strives to make sure that the plaintiffs, standing is BS&W's shoes, do not circumvent the Assignment of Contract Proceeds. In sum, SAMBA has a specific property interest in the funds at issue in the adversary

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[4] In this section, "creditor" and "debtor" are used in a general, non-bankruptcy specific way.

proceeding that it cannot protect from the sidelines. It is in the very circumstances for which intervention rights are designed.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 2, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-3891

IN RE: STONE & WEBSTER, INCORPORATED, et al,

Debtors.

STONE & WEBSTER, INCORPORATED; SWE & C LIQUIDATING TRUST, successor in interest to Stone & Webster Engineering Corporation

v.

SAUDI ARABIAN OIL COMPANY,

Saudi American Bank,

Appellant.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 06-cv-00399)
District Judge: Honorable Sue L. Robinson

Submitted under Third Circuit LAR 34.1(a)
on February 6, 2009

Appendix A

Before: RENDELL and ROTH, *Circuit Judges*
and HAYDEN*, *District Judge.*

(Opinion Filed June 1, 2009)

AMENDED OPINION

ROTH, Circuit Judge:

The Saudi American Bank (SAMBA) appeals the District Court's rejection of its appeal from the Bankruptcy Court's denial of its motion to intervene in the underlying adversary proceeding against the Saudi Arabian Oil Company (Saudi Aramco). The underlying proceeding was brought by Stone & Webster, Inc. and its subsidiary, Stone & Webster Engineering Corporation (SWEC), against Saudi Aramco for its breach of a contract with Bugshan Stone & Webster (BSW), a joint venture between SWEC and Abdullah Said Bugshan & Brothers,[1] to upgrade a large oil refinery at Ras Tanura in Saudi Arabia. We assume the parties' familiarity with the facts and the record of prior proceedings, which we refer to only as necessary to explain our decision. For the reasons given below, we affirm the District Court's order.[2]

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* Honorable Katharine S. Hayden, United States District Judge for the District of New Jersey, sitting by designation.

1. SWEC and Bugshan were each fifty-percent shareholders in BSW.

2. Jurisdiction initially vested in the bankruptcy court pursuant to 28 U.S.C. § 157(b). Jurisdiction for the district

(Cont'd)

SAMBA argues it is entitled to intervene under 11 U.S.C. § 1109(b), which provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). SAMBA also suggests it is entitled to intervention as of right under Rule 24(a)(2), which states that a court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. Pro. 24(a)(2).

SAMBA is not entitled to intervene under either section 1109(b) or Rule 24(a)(2). SAMBA is not a party in interest to the litigation between SWEC and Saudi Aramco. *See Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 321 B.R. 147, 158 (D.N.J.2005) ("The test to determine whether an entity is a party in interest

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(Cont'd)

court's review of the bankruptcy court's order was conferred by 28 U.S.C. § 158(a). In turn, our appellate jurisdiction rests upon 28 U.S.C. §§ 158(d) and 1291. In undertaking our review, we stand in the shoes of the district court, applying a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999).

is 'whether the prospective party in interest has a sufficient stake in the outcome of the proceeding so as to require representation.'"). Even granting a charitable interpretation to the assignment on which SAMBA relies to justify its intervention, this Court agrees with the District Court and the Bankruptcy Court before it that having a claim to proceeds of collateral does not entitle a party to intervene. As we stated in *Mountain Top Condominium Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995), "a mere economic interest in the outcome of litigation is insufficient to support a motion to intervene." Holding otherwise would permit every secured creditor to intervene in its debtor's litigation. Accordingly, SAMBA is not entitled to intervene.

For the foregoing reasons, we will affirm the District Court's order rejecting SAMBA's motion to intervene in SWEC's suit against Saudi Aramco.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3891

IN RE: STONE & WEBSTER,
INCORPORATED, et al,

Debtors

STONE & WEBSTER, INCORPORATED; SWE&C
LIQUIDATING TRUST, successor in interest to
Stone & Webster Engineering Corporation

v.

SAUDI ARABIAN OIL COMPANY

Saudi American Bank,

Appellant.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 06-cv-00399)
District Judge: Honorable Susan L. Robinson

Submitted under Third Circuit LAR 34.1(a)
on February 6, 2009

Appendix B

Opinion filed June 1, 2009

Before: RENDELL and ROTH, *Circuit Judges*
and HAYDEN*, *District Judge*

ORDER

ROTH, *Circuit Judge:*

The panel has determined that footnote No. 3 should be deleted from the opinion which was filed on June 1, 2009. Accordingly, it is hereby ORDERED that the opinion filed on June 1, 2009 is hereby vacated and an amended opinion shall be filed simultaneously with this order. The revised opinion does not alter the June 1, 2009 judgment or the en banc court's decision to deny Appellant's petition for rehearing en banc.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: July 2, 2009

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* Honorable Katharine S. Hayden, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED AUGUST 29, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Bk. No. 00-2142(PJW)
Jointly Administered
Adv. No. 02-03963(PJW)

Civ. No. 06-399-SLR

In re:

STONE & WEBSTER, INC., et al.,

Debtors.

SAUDI AMERICAN BANK,

Appellant,

v.

SAUDI ARABIAN OIL COMPANY, STONE & WEBSTER, INC., STONE & WEBSTER ENGINEERING CORP., and SWE&C LIQUIDATING TRUSTEE,

Appellees.

Appendix C

MEMORANDUM ORDER

At Wilmington this 29th day of August, 2007, having reviewed the appeal taken by Saudi American Bank ("SAMBA") from a decision denying SAMBA's motion to intervene in the above referenced adversary proceeding;

IT IS ORDERED that said appeal is denied and the decision of the United States Bankruptcy Court for the District of Delaware issued on May 1, 2006 is affirmed, for the reasons that follow:[1]

1. **Standard of review.** This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. See *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank,*

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1. Given my decision, SAMBA's motion to stay pending appeal (D.I. 18) is denied as moot. Also moot are the pending motions to strike (D.I. 14) and to supplement the record (included within D.I. 16).

N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing *Universal Minerals, Inc. v. C.A. Hughes Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a *de novo* basis bankruptcy court opinions. *In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002).

2. Background facts. The above captioned adversary proceeding stems from a business transaction gone bad in Saudi Arabia, which transaction has generated multifaceted litigation, including a related adversary withdrawn to this court for resolution. *See Saudi American Bank v. Shaw Group, et al.*, Civ. No. 04-834-SLR (D. Del.). A brief recitation of the underlying facts is necessary to understand the current dispute.

3. On May 31, 1980, Stone & Webster Engineering Corporation ("SWEC") and Abdullah Said Bugshan & Bros. ("Bugshan"), a Saudi Arabian business enterprise, formed a joint venture called Bugshan Stone & Webster ("BSW") under the laws of Saudi Arabia. BSW was owned in equal shares by SWEC and Bugshan. In the mid 1990s, BSW entered a $130 million contract with Saudi Arabian American Oil Company ("Aramco") to upgrade a large oil refinery at Ras Tanura in Saudi Arabia (the "Ras Tanura Contract"). In an attempt to induce appellant SAMBA to grant credit to BSW, Bugshan and SWEC each agreed to issue guaranties to

SAMBA for 50% of any loans SAMBA made to BSW. On October 11, 1994, SWEC delivered a letter guarantying payment of 50% of all obligations owed to SAMBA by BSW, up to thirty five million dollars (the "Guaranty"). In 1997, SAMBA approved a loan to BSW for $35 million "to finance mobilization & working capital requirements" of the Ras Tanura Contract. Unfortunately, BSW ran into difficulties on the Ras Tanura project and was unable to repay SAMBA the outstanding amount of the loan when the project was completed. In late 1998, pursuant to their guaranties, SWEC and Bugshan each agreed to repay one-half of the outstanding loan at a rate of $650,000 per month. SWEC has not repaid its portion of the loan. By my decision in *Saudi American Bank v. Shaw Group, et al.*, Civ. No. 04-834-SLR (D. Del.) (D.I. 11), I determined that the Shaw Group ("Shaw") assumed the Guaranty (and the debt owing thereunder to SAMBA) under an Asset Purchase Agreement ("APA) entered into by Stone & Webster, Inc. and Shaw, which APA was approved in the above referenced Chapter 11 bankruptcy proceedings.

4. The instant adversary proceeding was commenced by debtors Stone & Webster, Inc. and SWEC against Aramco in May 2002. As I read the complaint, it was instituted in response to a proof of claim filed by Bugshan seeking reimbursement from the debtors for a claim against BSW, a non-debtor, in a Saudi Arabian lawsuit, as well as for costs Bugshan incurred in defending BSW against the lawsuit. (*See* SAMBA's

revised record on appeal at A00005)[2] Debtors reason that, if the bankruptcy court were to hold (contrary to America law) that a shareholder of BSW (SWEC) is liable for the corporate obligations of BSW, then the shareholder (SWEC) should be allowed to step into the shoes of BSW and assert BSW's rights to recover claims against Aramco for breach of the Ras Tanura Contract, which breach, it is asserted, led to the lawsuit that is the underlying basis for Bugshan's proof of claim.[3] (*Id.* at A00001-A00022) SAMBA filed a motion to intervene in this proceeding, which motion was denied by the bankruptcy court. SAMBA filed the instant appeal from this decision.

5. SAMBA asserts in connection with its appeal that intervention is appropriate because BSW signed an agreement with SAMBA whereby BSW "assigned" to SAMBA "all proceeds of the [Ras Tanura] Contract (Proceeds), which shall include proceeds of claims arising out of the Contract . . . . Such Proceeds shall be security for all obligations of [BSW] to the Bank and may be applied by the Bank in satisfaction of all such obligations whether incurred in connection with the Contract or otherwise." (*Id.* at A01330, the "Assignment of Contract

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2. The Saudi Arabian lawsuit was filed by a subcontractor hired to perform various portions of the work related to the Ras Tanura project. (*See id.* at A00009-00011)

3. I understand that said proof of claim, claim 4419, has not yet been resolved.

Proceeds," hereinafter "the Assignment") The Assignment further provided that SAMBA

> may establish a collateral account for [BSW] and deposit Proceeds in such account. Amounts so deposited shall be released to [BSW] so long as no event of default exists under any credit agreement with the Bank and the Bank has not demanded payment of, or cash collateral for, any facilities extended to [BSW].

(*Id.* at A01331) In its appeal, therefore, SAMBA further extends the hypothetical of the adversary proceeding and reasons that, if SWEC is allowed to step into the shoes of BSW for purposes of collecting money from Aramco for Aramco's breach of the Ras Tanura Contract, then SAMBA should be allowed to assert its rights to collect such "Proceeds" under the Assignment against SWEC, a non-signatory of the Assignment.

6. **Analysis.** Given my view of the underlying facts, I decline to embrace the legal fiction upon which SAMBA has to rely to justify intervention in the adversary, to wit, that SWEC's potential liability for the conduct of BSW under the Ras Tanura Contract extends to the Assignment, of which SWEC was not a signatory.[4]

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4. In other words, in order for SAMBA to prevail, the following "legal fictions" must be proved, presumably under Saudi law: (1) SWEC is liable for BSW's obligations in the Saudi Arabian lawsuit, even though SWEC is a shareholder; (2) (Cont'd)

Appendix C

I further conclude that, even if SWEC were deemed to be obligated under the Assignment, a reasonable interpretation of the Assignment limits SAMBA's rights thereunder to funds actually deposited in BSW's bank account (i.e., in SAMBA's possession at any given time), as would be the case under the common law of setoff. Therefore, if funds collected by SWEC were to pass through SAMBA, SAMBA may assert those rights in Saudi Arabia (assuming BSW still has an account). Absent actual possession of the funds, however, I decline to rule that SAMBA has the broad, virtually unlimited right to claim any monies related to the Ras Tanura Contract, especially in light of the added protection SAMBA acquired through the Guaranty.

s/ Sue L. Robinson
United States District Judge

(Cont'd)

SWEC has the right to collect and share with the bankruptcy estate BSW's assets (claim for breach of contract against Aramco), even though BSW is a non-debtor; (3) SWEC is held liable for BSW's obligations under the Assignment, even though SWEC is a non-signatory; (4) SAMBA is allowed to share the monies SWEC has collected by reason of the Assignment, even though said monies were never in SAMBA's possession or, perhaps, even in Saudi Arabia. Because SWEC has not yet been held liable for BSW's obligations in Saudi Arabia, and that finding of liability is the keystone of the adversary proceeding, one might characterize the above reasoning as dependent on a house of cards.

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE DENYING MOTION TO INTERVENE DATED MAY 1, 2006

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11

Case No. 00-2142 (PJW) Jointly Administered

Adv. No. 02-3963 (PJW)

Ref. Nos. 19, 49

In re:

STONE & WEBSTER, INC., *et al.*,[1]

Debtors.

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1. The Debtors are the Consolidated SWINC Estate and the Consolidated SWE&C Estate. As more particularly set forth in Article VII (B) of the Third Joint Plan, certain debtor subsidiaries of Stone & Webster, Incorporated are merged into Stone & Webster, Incorporated, and their estates have been substantively consolidated to become the Consolidated SWINC Estate; and certain debtor subsidiaries of Stone & Webster Engineers and Constructors, Inc. are merged into Stone & Webster Engineers and Constructors, Inc., and their estates have been substantively consolidated to become the Consolidated SWE&C Estate.

Appendix D

STONE & WEBSTER, INCORPORATED, and STONE & WEBSTER ENGINEERING CORPORATION, *et al.*,

Plaintiffs,

v.

SAUDI ARABIAN OIL COMPANY,

Defendant.

ORDER DENYING MOTION TO INTERVENE

Upon Saudi American Bank's Motion to Intervene and to Join Abdulla Said Bugshan & Brothers as a Defendant (the "Motion"); and after a hearing to consider the Motion having been held on April 25, 2006 (the "Hearing"); and the Court having considered the Motion and the objections thereto; it is hereby

ORDERED that, for the reasons set forth on the record at the Hearing, the Motion is denied.

Dated: May 1, 2006
Wilmington, Delaware

s/ Peter J. Walsh
The Honorable Peter J. Walsh
United States Bankruptcy Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED JULY 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3891

IN RE: STONE & WEBSTER,
INCORPORATED, et al,

Debtors

STONE & WEBSTER, INCORPORATED; SWE&C
LIQUIDATING TRUST, successor in interest to
Stone & Webster Engineering Corporation

v.

SAUDI ARABIAN OIL COMPANY

Saudi American Bank,

Appellant

Before: SCIRICA, *Chief Judge*, McKEE, RENDELL, AMBRO, FUENTES, FISHER, CHAGARES, and ROTH*, *Circuit Judges*

---

1. Judge Roth's vote is limited to panel rehearing only.

Appendix E

ORDER

The petition for panel rehearing and rehearing *en banc* filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: July 2, 2009

SUPREME COURT, U.S.
FILED
DEC 30 2009
OFFICE OF THE CLERK

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(2)

No. 09-394

In the Supreme Court of the United States

SAUDI AMERICAN BANK,

Petitioner,

v.

SWE&C LIQUIDATING TRUST, successor-in-interest to STONE & WEBSTER ENGINEERING CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION

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Counsel for Respondent

December 30, 2009

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The SWE&C Liquidating Trustee is the court-appointed trustee of the SWE&C Liquidating Trust ("Trust"). The Trust is not a corporation. However, among other creditors, shareholders of the formerly publicly traded Stone & Webster, Incorporated, are indirect beneficiaries of the Trust through claims held by the Consolidated SWINC Estate.

No other party listed as a Respondent in Petitioner's case caption participated in the relevant motion proceedings or appeals in the lower courts.

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STATUTES INVOLVED

Title 11, United States Code

§ 1102. Creditor's and equity security holders' committees

(a) (1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of

a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act [15 USC § 632(a)(1)]), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

§ 1103. Powers and duties of committees

(c) A committee appointed under section 1102 of this title [11 USC § 1102] may –

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title [11 USC § 1104]; and

(5) perform such other services as are in the interest of those represented.

INTRODUCTION

If this were the time to resolve a split among three circuit courts about the right of official committees in bankruptcy cases to intervene in adversary proceedings, this is not the case to accomplish that task. Petitioner Saudi American Bank has seized on that split to create the appearance of an issue worthy of certiorari – but Petitioner has advanced no reason why it, as an individual creditor, should claim the same rights as official committees to intervene in adversary proceedings, a conclusion that no circuit court has yet advanced.

Not only are the facts of this case the wrong facts to resolve the split, the split does not even present itself in the underlying case. The only way that this Court can consider the split is by deciding: (1) that the Third Circuit did not follow its own alleged "rule" that differs from the Fifth Circuit's "rule"; (2) that the Third Circuit should have followed its own "rule"; and (3) that if the Third Circuit had followed that "rule," the Third Circuit's holding would be contrary to the Fifth Circuit "rule." But the "rules" arise under facts that diverge too sharply from the facts of this case to allow anything but a theoretical discussion of the circuit split. Certiorari is not appropriate in this case.

STATEMENT OF THE CASE

Petitioner Saudi American Bank had long since resolved its own claim against any debtor in the bankruptcy case when Petitioner attempted to intervene in an adversary proceeding pending in the United States Bankruptcy Court for the District of Delaware, one month after hearing about a possible settlement in the proceeding. As Petitioner implicitly concedes, it was motivated solely to hijack a settlement that seemed to have been reached between a debtor in the bankruptcy case, Stone & Webster Engineering Corporation ("SWEC"), and Saudi Arabian Oil Company ("Aramco"). Petitioner did not claim to have any evidence, experience, or knowledge to help prosecute or defend SWEC's claims. Petitioner's sole justification for intervening was its claim to have a perfected security interest in proceeds of any settlement.

Two years later in 2004, the initial proposed settlement was history and Respondent, the SWE&C Liquidating Trust ("Trust"), succeeded to SWEC's interests to resolve all remaining claims against SWEC and to prosecute SWEC's claims against third parties for the benefit of SWEC's creditors. The Trust assumed control of the adversary proceeding against Aramco. When the bankruptcy court sought an update on the case, counsel for the Trust announced in court that the Trust intended to file an amended complaint, and advised that Aramco intended to pursue its long-dormant motion to withdraw the reference. The bankruptcy court, however, ordered mediation.

When Petitioner learned in 2006 that the Trust and Aramco had agreed to terms of a new tentative settlement following mediation and long, difficult negotiations, Petitioner demanded that the bankruptcy court hear Petitioner's motion to intervene filed four years earlier.

The bankruptcy court's decision[1] establishes why intervention was inappropriate: Documents attached to and referenced in the complaint-in-intervention, and even documents and declarations submitted to support intervention, did not show that Petitioner had perfected a security interest that could attach to any settlement – facts and conclusions reiterated by the bankruptcy court in a later decision. *See SWE&C Liquidating Trust v. Saudi Arabian Oil Co. (In re Stone & Webster, Incorporated)*, 373 B.R. 353, 364 (Bankr. D. Del. 2007) ("At the hearing on SAMBA's intervention motion, SAMBA's counsel did not attempt to validate the assignment under Saudi law, or any other law. Thus, I conclude again that SAMBA has not proved that it has a perfected security interest in the contract proceeds.").

---

[1] Though this Court's rules required Petitioner to provide "[a]n appendix containing . . . the opinions, orders, findings of fact, and conclusions of law, whether written *or orally given and transcribed*" (Sup. Ct. R. 14(i) (emphasis added)), Petitioner inexplicably omitted the bankruptcy court's detailed analysis at the hearing on Petitioner's motion to intervene. (*See* Respondent's Appendix (Transcript of Proceedings, April 25, 2006).) Petitioner included only the bankruptcy court's order resulting from that decision. (*See* Petition, Appendix D at 14a.)

Petitioner's failure to present authority or evidence at any stage of the proceedings that it perfected a security interest under any applicable law doomed all of Petitioner's intervention theories. *See* 7C Chas. Alan Wright, *et al.*, *Federal Practice and Procedure* § 1914 at 523 (3d ed. 2007) (instructing that a proposed complaint-in-intervention "must state a good claim for relief"). Petitioner argued in response only that the bankruptcy court had to accept Petitioner's conclusory allegation that it had a perfected security interest – an argument that this Court seemingly foreclosed when it held that courts should not accept conclusory legal allegations where the facts do not support the allegations. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2008) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

The Third Circuit was no more impressed by Petitioner's claim of a perfected security interest, but affirmed on the basis that even a perfected interest in litigation proceeds does not justify intervention. (*See* Petition, Appendix A at 4a ("*Even granting a charitable interpretation to the assignment on which SAMBA relies to justify its intervention*, this Court agrees with the District Court and the Bankruptcy Court before it that having a claim to proceeds of collateral does not entitle a party to intervene." (emphasis added)).) Nevertheless, Petitioner argues that it is entitled to intervene in the action between the Trust and Aramco even if SAMBA cannot demonstrate a cognizable claim in the litigation.

REASONS FOR DENYING THE PETITION

Petitioner argues that the Third Circuit was wrong to find that an interest in proceeds of litigation is insufficient in itself to justify intervention. Petitioner ignores the bankruptcy court's findings that Petitioner failed to prove a perfected interest "under Saudi, or any other law." *SWE&C Liquidating Trust*, 373 B.R. at 364. Pushing aside these grounds for finding its case for intervention to be deficient, Petitioner argues for certiorari to resolve "an important question of federal law on which the circuit courts are split." (Petition at 10.) The circuit split is illusory on the facts of Petitioner's case, however. Even on facts that are far more compelling than Petitioner's case, the history of the issue does not show it to be an important question of federal law.

A. No Circuit Split Exists On The Issue That Petitioner Wants This Court To Decide: An Individual Creditor's Unconditional Right To Intervene In Adversary Proceedings.

Petitioner's theory relies upon a broad reading of Bankruptcy Code § 1109(b):

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b).[2]

Petitioner argues that the right "to appear and be heard" entitles any listed "party in interest" to intervene in any adversary proceeding without showing any protectable interest in the proceeding. However, the circuit cases that Petitioner cites for its theory limit their holdings to the narrow context of intervention by official committees, appointed by the United States Trustee, to represent the interest of a specific constituency in the bankruptcy case. *See, e.g.*, 11 U.S.C. § 1102(a) (requiring United States Trustee to appoint committees); 11 U.S.C. § 1103(c) (listing powers and duties of committees, including the performance of "such . . . services as are in the interest of those represented").

The Second and Third Circuits have not extended their holdings beyond committees, and both circuits explicitly justify the holdings by the unique role that committees play in a Chapter 11 case:

> Section 1109(b) is an important monitoring tool at the disposal of the creditors' committee. Intervention under that section appears to be appropriate to the extent it will: (1) minimize the need for extensive judicial oversight, (2) speed the debtor's successful reorganization, and (3) allow the creditors' committee to exert enough leverage

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[2] This section applies only to so-called reorganization cases under Chapter 11 of the Bankruptcy Code, and not to liquidation cases under Chapter 7. *See* 11 U.S.C. § 1109(b) (limiting application "to a case under this chapter").

> on the debtor-in-possession so that the debtor-in-possession does not use its extensive flexibility and discretion in a Chapter 11 reorganization to compromise the creditors' interests. In short, interests of efficiency and fair play underlie § 1109(b), and the driving force behind the *Marin* decision [*Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3d Cir. 1982))] was the belief that allowing intervention into adversary proceedings would best serve those interests.

Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.), 303 F.3d 161, 175-76 (2d Cir. 2002) (quoting *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 (3d Cir. 1994)). The cases may discuss "creditors" in their broad strokes, but the Second and Third Circuit justify intervention by the responsibility of committees to police a case for the benefit of their constituency. Thus, Petitioner's case is a poor choice to decide if committees have an unconditional right to intervene.

On an individual creditor's unconditional right to intervene, an issue not yet addressed by any circuit court in a precedential opinion, the question is far from ripe for review by this Court. Given the Third Circuit's rejection of Petitioner's arguments, even when Petitioner argued that *Phar-Mor* and *Marin* bound the Third Circuit, the Third Circuit clearly did not see either case as binding precedent on the narrow issue in Petitioner's case.

No less so in the Second Circuit, "the scope of the unconditional intervention right of a party in interest as enunciated by . . . *Caldor*' remains unclear." *Smart World Techs., Inc. v. Juno Online Svcs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 181 (2d Cir. 2005) (quoting *Iridium India Telecom Ltd. V. Motorola, Inc. (In re Iridium Operating, LLC)*, 329 B.R. 403, 406 (S.D.N.Y. 2005)); *see also In re Iridium India Telecom*, 329 B.R. at 406 ("[T]his Court need not address the question of whether such right extends to a situation in which the proposed intervenor does not seek to assert claims or defenses in the underlying litigation.").

Given the lack of any opinion by any other circuit court on Petitioner's narrow issue, no circuit split currently exists on the issue of a *creditor's* right to intervene.[3]

---

[3] Petitioner cites three cases for the proposition that "other Courts of Appeals . . . have indicated in dicta that they agree with the Fifth Circuit's conclusion" in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1287 (5th Cir. 1985). (Petition at 14.) However, two of the three cases are Chapter 7 cases where Bankruptcy Code § 1109 is unambiguously inapplicable. *See Richman v. First Woman's Bank (In re Richman)*, 104 F.3d 654, 658 (4th Cir. 1997) (considering *Fuel Oil Supply*'s reasoning persuasive on the issue of intervention in a Chapter 7 case); *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1142 n.8 (1st Cir. 1992) (holding that a creditor was not entitled to intervene-of-right in a Chapter 7 case; comparing the holding of *Fuel Oil Supply* with a Southern District of New York case that rejected *Fuel Oil Supply's* analysis). The sole Chapter 11 case involves a purchaser of the debtor's property, and not one of the listed

B. The Dearth Of Circuit Cases On The Issue Of A *Committee's* Right To Intervene Does Not Validate Petitioner's Claim That A *Creditor's* Right To Intervene Is An Important Question Of Federal Law.

Belying the alleged importance of the question, only three circuits have issued published or precedential opinions in twenty-eight years on the issue of a *committee's* unconditional right to intervene. (*See* Petition at 14.) No published or precedential case has considered the extension of such a doctrine to creditors, and even the Third Circuit did not consider the issue to be significant enough to designate its opinion in Petitioner's case as precedential. *Cf.* Internal Operating Procedures, 3d Cir., 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").

Perhaps more importantly, whether or not a *committee* has an unconditional right to intervene, rather than a right to intervene as of right or grace, may rarely be significant. Though the Fifth Circuit agreed with the district court that the creditors'

"parties in interest" in Bankruptcy Code § 1109. *See Vermejo Park Corp. v. Kaiser Coal Corp. (In re Kaiser Steel Corp.)*, 998 F.2d 783, 790 (10th Cir. 1993) (finding that purchaser's contractual rights did not bestow a "significantly protectable interest" in an adversary proceeding). The cited cases do not illustrate a circuit split on any issue.

committee in *Fuel Oil Supply* had no unconditional right to intervene, the circuit still reversed and remanded for the district court to make "findings of fact or conclusions of law" on the committee's right to intervene "as of right . . . or by permission . . . ." *Fuel Oil Supply*, 762 F.2d at 1287-88. The trail goes cold at that point. The record does not reveal whether or not the committee ultimately won the right to intervene. But given the broad standing bestowed on committees because of their role in a bankruptcy case, the differing approaches may make little practical difference. Thus, even on the issue of a committee's right to intervene, the record is too undeveloped to know if the Fifth Circuit approach makes a real-world difference.

Petitioner's case, not involving a committee, would make review by this Court nothing more than a speculative exercise. Even on the issue of a committee's right to intervene, the issue will benefit from much more percolation in the lower courts before making it ripe for review by this Court.

CONCLUSION

This case is inappropriate for certiorari for a multiplicity of reasons. Most significantly, the circuit split that Petitioner relies upon – whether official committees in bankruptcy cases have an unfettered right to intervene in adversary proceedings – is inapplicable to the facts of Petitioner's case. Even if Petitioner's case were up to the task, the paucity of appellate cases provides a

weak record on which to determine what, if any, impact the two approaches to intervention have on the ability of committees to perform their statutory function in bankruptcy cases.

To the extent that Petitioner asks this Court to revisit the denial of its motion to intervene on any other basis, Petitioner asks this Court to substitute its judgment for the judgments of three lower courts, including the bankruptcy court that examined Petitioner's conclusory allegations and found them lacking on Petitioner's facts. If the circuit split needs the attention of this Court, the Trust respectfully suggests that this is not the case and this is not the time. The Trust prays that the Court deny the Petition.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
STONE & WEBSTER, INC., *et al.*,	.	Case No. 00-2142(PJW)
	.	
Debtors.	.	Jointly Administered
	.	
STONE & WEBSTER, INCORPORATED, and STONE & WEBSTER ENGINEERING CORP., *et al.*,	.	Adv. No. 02-3963(PJW)
	.	
	.	April 25, 2006
	.	1:30 p.m.
	.	(Wilmington)
Plaintiff,	.	
v.	.	
	.	
SAUDI ARABIAN OIL COMPANY,	.	
	.	
Defendant.	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER J. WALSH
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

Page 6, *l.* 2, to page 7, *l.* 21:

THE COURT: Because as I look at these documents, I don't know anything about Saudi Arabian banking law, but under U.S. law, which I assume is not applicable here, I doubt if you have an assignment. And let me go through the documents. Looking first at Exhibit 1 to your motion, this is captioned Assignment of Contract Proceeds, I guess the first thing I would note is that it's dated the 22nd of January, 1995. You said the Loan was in January of '98. But more importantly, that document, quote, "Assignment of Contract Proceeds" recites the assignor hereby assigns to the bank all the proceeds of the contract. Further down on that column it says, The assignor shall immediately notify all payors under the contract of this assignment in such form as may be required by payor, or if no specific form is required, by letter in substantially the following form. And then there's a form letter that says, We hereby advise you that we have executed an assignment of proceeds in favor of Saudi Arabian, Saudi American Bank. But that's not the letter that was sent, and I'm now looking at Exhibit 2, which is a September 21, 1994, quote, "Specific Payment Instruction Letter", close quote. And it reads, quote, "This letter" – and this is a letter from the borrower to, to the Saudi Arabian Oil Company – quote, "This letter requests and authorizes you to pay Saudi American Bank, Floor (phonetic) branch, P.O. Box 842, Alchobar (phonetic)

with a zip code, Saudi Arabia, for credit to our account any and all compensation due from you under contract number 65004." It then goes on to say, and I quote, "We shall mark all our invoices presented to you pay to Saudi American Bank, Floor Branch, P. O. Box" etcetera "for account of Bugshan, S & W Company Limited." Close quote. That doesn't sound like an assignment to me. It sounds like a direction as to what account the proceeds should be paid, and it identifies account of the party that contracted with the Saudi Arabian Oil Company. Isn't that what it says? Let me go on. In Exhibit no. 4, which is a May 11, 2002 letter from the bank to the oil company, it references an assignment of all payments, and it says, We write to remind Saudi Aramco that BS&W by letter dated September 21, 1994, paren, (the, quote, "Specific Payment Instruction Letter", close quote) a copy of which is attached, requested and authorized, etcetera. And in Exhibit 5, the response from the oil company to the bank is to confirm the assignment and authorization contained in the subject specific payment instruction letter which is not a letter suggesting an assignment. And your response is?

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No. 09-394

Supreme Court, U.S.
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JAN 13 2010

IN THE

Supreme Court of the United States

In re: STONE & WEBSTER, INC.

SAUDI AMERICAN BANK,

Petitioner,

v.

SAUDI ARABIAN OIL CO.,
STONE & WEBSTER, INC.,
STONE & WEBSTER ENGINEERING CORP.,
and SWE&C LIQUIDATING TRUSTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT IN REPLY

I. Respondent's Opposition Is Based Upon A Distinction Between Creditors And Committees That Does Not Exist In The Statute.

Respondent acknowledges that the Courts of Appeals are split on whether Bankruptcy Code § 1109(b) grants an absolute right to intervene in adversary proceedings. Respondent grounds its Brief in Opposition to SAMBA's Petition for Certiorari on the erroneous contention that the circuit split is not significant for this case because SAMBA is an individual creditor and party in interest whereas the cases evidencing the split involved committees of creditors. The distinction upon which Respondent's opposition rests does not exist in the statute:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b). On the plain language of § 1109(b), there is no basis for treating a creditor differently from a creditors' committee — both are defined as parties in interest.

In buttressing the phantom distinction, Respondent's argument mischaracterizes the relevant Courts of Appeals decisions by stating that the cases "limit their holdings to the narrow context of intervention by official committees,

appointed by the United States Trustee." Brief in Opposition at 8. Quite the opposite is true. While the cases each involved a committee, each of the Courts of Appeals acknowledged that the question implicated — and that its holding would apply just the same to — individual creditors. For example, the Third Circuit and the parties before it in *Marin Motor Oil* recognized that the absolute right it was recognizing encompassed individual creditors as well as representative committees:

> Appellants are unable to provide any support for their speculation that multitudes of individual creditors and stockholders would intervene in adversary proceedings unless we reject the broad and absolute reading of section 1109(b). Surely relatively few individuals would have enough interest in the outcome of an adversary proceeding to seek to intervene.

Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.), 689 F.2d 445, 453 (3d. Cir. 1982). The Second Circuit framed its *Caldor Corp.* opinion just as broadly:

> [Appellant] argues that [§ 1109(b)] creates an unconditional statutory right for *parties in interest* to intervene in adversary proceedings that occur in connection with a Chapter 11 bankruptcy case. Because we find that the plain text of the statute indicates Congress

> intended to grant such a right, we reverse the lower courts' decisions and remand . . . .

Term Loan Holder Comm. v. Ozer Group, L.L.C. (In re Caldor Corp.), 303 F.3d 161, 162-63 (2d Cir. 2002) (emphasis added). *See also Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1232 (3d Cir. 1994) ("We rejected the trustee's argument, stating that § 1109(b) gave *parties in interest* an 'unqualified' right to be heard ....") (emphasis added) (citing to and characterizing the holding in *Marin Motor Oil*). The Fifth Circuit, while coming out the other way on whether § 1109(b) applied to adversary proceedings, also made no distinctions among parties in interest. *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1285, 1287 (5th Cir. 1985) (stating the question as "whether § 1109(b) provides parties in interest with an absolute right to intervene in bankruptcy adversary proceedings" and declining to follow *Marin Motor Oil* in part because it concluded that, under that case, "both the committee and each individual creditor — perhaps hundreds of them — would be automatic parties to every adversary proceeding connected with the case"[1]).

The legislative history supports the unanimous view that, however interpreted, § 1109(b) applies equally to all parties in interest. The relevant Senate Report stated that the provision which became § 1109(b) "[p]rovides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to

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1. Of course, a party in interest would only become a party to the proceeding if it sought to intervene.

be heard as a party in interest under the chapter in person, by an attorney, or by a committee." S. Rep. No. 95-989, at 116, *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

A leading treatise explains why application of § 1109(b) at both an individual and a collective level furthers the fundamental purposes of Chapter 11 — that is, to provide a forum for the negotiated resolution of a case in a manner that is as inclusive and accommodating as possible. "[E]ven though the [Bankruptcy] Code provides for and recognizes the use of representative bodies and structures (*e.g.*, 'committees' and 'classes'), it also necessarily promotes the right of each individual to voice his or her views regarding the course of the case as well as the resolution of significant disputes that may affect either its outcome or the ultimate treatment of the individual's stake." 7 *Collier on Bankruptcy* ¶ 1109.02[3][a] (15th ed. Rev. 2008).

II. SAMBA'S Complaint In Intervention Stated A Good Claim For Relief And Did Not Rely Upon Conclusory Allegations.

Respondent seeks to distract the Court from the merits of the Petition by referring to the Bankruptcy Court's premature speculation about the validity of SAMBA's Assignment of Contract Proceeds.[2] Respondent highlights those concerns in its Brief in Opposition, but neither it nor any other party questioned the validity of the Assignment when opposing the motion

2. Capitalized terms not defined herein have the meaning given to them in the Petition for Certiorari.

to intervene in the Bankruptcy Court. They were right not do so because the record shows that SAMBA's Complaint in Intervention stated an adequately pleaded claim against Saudi Aramco that was not based on conclusory allegations. Accordingly, the Bankruptcy Court's hesitation about the ultimate merits of SAMBA's case was not a proper basis for denying intervention and should not give this Court pause in its consideration of the Petition.[3]

SAMBA attached to its Complaint in Intervention the documents establishing its interest in the Contract Proceeds:

- The "Assignment of Contract Proceeds" provided that BS&W "hereby assigns to [SAMBA] all proceeds of the Contract (Proceeds), which shall include proceeds of claims arising out of the Contract." APP0116.[4]

- BS&W sent Aramco the Specific Payment Instruction Letter, instructing Aramco to "pay Saudi American Bank . . . for credit to our account any and all compensation due from you under the [Ras Tanura Contract]." APP0119.

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3. It bears noting that the Third Circuit rested no part of its decision on a concern about the validity of the Assignment.

4. "APP___" cites are to the Appendix submitted to the Court of Appeals.

- Saudi Aramco's subsequent "Acknowledgement of Assignment" stated "[w]e hereby acknowledge receipt of [BS&W's] payment assignment letter." APP0121.

SAMBA recognizes that "naked assertion[s] devoid of further factual enhancement" are insufficient at the pleading stage. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted) (alteration in original). However, its claim to an interest in the Contract Proceeds is factually developed and fully clothed.

Those specifically alleged facts support SAMBA's claim to a protectable legal interest in the Contract Proceeds. "To make an effective assignment of a contract right, the owner of that right must manifest an intention to make a present transfer of the right without further action by the owner or by the obligor." 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 11.3 (3d ed. 2004). "If the right is assignable, no action by either the assignee or obligor is required for an effective assignment." *Id.* § 11.3a. It is beyond cavil that the right to receive a payment of money is assignable, and there is no legitimate basis for questioning the facial validity of the Assignment. Indeed, the Bankruptcy Court did not cite any law in support of its questions about the validity of the Assignment, and the Respondent has not identified any such law to support its subsequent parroting of the Bankruptcy Court's concerns.

In light of SAMBA's specific factual allegations and the documents it attached to the Complaint in Intervention, the Bankruptcy Court's denial of the motion to intervene based on a question about the ultimate validity of SAMBA's claim to the Contract Proceeds was improper. An application for intervention cannot be resolved "by reference to the ultimate merits of the claim the intervenor seeks to assert unless the allegations are frivolous on their face." *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). Given that "the court's ruling determines whether the claim or defense can be litigated and justice sought," the court "must be liberal in determining whether a valid cause of action or defense has been pleaded, at least as liberal as it is on" motions to dismiss. 35A *C.J.S. Federal Civil Procedure* § 196 (2007).

Similarly, the Court should not be dissuaded from granting the petition by Respondent's reference to the possibility that it might in the future attempt to amend the Debtors' complaint. By its own admission, Respondent has been raising the possibility of amending the Debtors' complaint for at least six years now. It has never done so. Whether Respondent will someday seek leave to amend (to settle around SAMBA and evade its right to intervene or for some other purpose), the Court should decide whether to grant the Petition based on the Debtors' complaint — the pleading that has been on file in this case since 2002.

III. The Question Of The Proper Scope Of § 1109(b) Is Important To The Administration Of Reorganization Cases Under Chapter 11 And To Related Adversary Proceedings.

Section 1109(b) is not an obscure provision of federal law. It applies with respect to all Chapter 11 reorganization cases. While not every circuit has taken a position on the issue of whether it grants parties in interest an unconditional right to intervene in adversary proceedings, the split is genuine among the three that have done so. Moreover, as a result of the lower court opinions in this case, there is now divergent interpretation in two of the most significant bankruptcy venues in the country, the District of Delaware (out of which this case arose) and the Southern and Eastern Districts of New York. The Bankruptcy and District Courts of Delaware have adopted (and presumably will continue to apply) the narrow view of § 1109(b) shared by the Fifth Circuit while federal courts in New York are governed by the contrary holding of *Caldor Corp.* Finally, while the Third Circuit panel in this case did not designate its opinion as "precedential," it may still be cited under Federal Rule of Appellate Procedure 32.1, which provides that a court may not prohibit or restrict the citation of federal judicial opinions issued after January 1, 2007, even if they have been designated as "not precedent" or "non-precedential."

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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